Supreme Court, U.S.
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No. 99-76

IN THE

Supreme Court of the United States

REBECCA A. BERG,

Petitioner,

v.

NORAND CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

KEVIN J. VISSER*
PAUL D. GAMEZ
MOYER & BERGMAN, P.L.C.
Attorneys for Respondent
2720 First Avenue, N.E.
P.O. Box 1943
Cedar Rapids, Iowa 52406-1943
(319) 366-7331

* *Counsel of Record*

154550

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit properly affirmed the district court's grant of summary judgment to Respondent by concluding Petitioner presented insufficient evidence to show that the Respondent acted in a discriminatory or otherwise unlawful manner?

PARTIES TO THE PROCEEDING

The Petition accurately lists the names of the parties at the time the Petitioner's lawsuit was filed. Since that time, through a series of corporate acquisitions, the Respondent has been merged into Intermec Technologies Corporation, a Washington Corporation. UNOVA, Inc., a publicly held company, is the parent company of Respondent and owns all of its stock.

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STATEMENT OF THE CASE

On July 7, 1995, Petitioner, Rebecca A. Berg ("Berg") filed a complaint against her former employer, Norand Corporation ("Norand"), alleging disability discrimination in violation of 42 U.S.C. § 12101, *et seq.* (The Americans with Disabilities Act) and Iowa Code § 216 (1993) (the Iowa Civil Rights Act), wage discrimination in violation of 42 U.S.C. § 2000e, *et seq.* (Title VII), 29 U.S.C. § 215a(3) (Fair Labor Standards Act) and 29 U.S.C. § 206(d) (Equal Pay Act), negligent misrepresentation, breach of implied contract and false imprisonment. By order of the United States District Court for the Northern District of Iowa, Cedar Rapids Division, dated April 3, 1996, Berg's claim pursuant to the Fair Labor Standards Act was dismissed. Berg's remaining claims were dismissed by the district court when it granted summary judgment in favor of Norand because Berg did not establish even a *prima facie* case as to any claim. Pet. App. 15a-25a. The Eighth Circuit, in a unanimous panel decision, affirmed the district court's decision. Pet. App. 1a-14a. Berg's petition for rehearing and for rehearing en banc was subsequently denied. Pet. App. 26a. Only the Title VII and Equal Pay Act wage discrimination claims are included in Berg's Petition for a Writ of Certiorari.

Norand filed its Motion for Summary Judgment on August 25, 1997. Thus, Berg enjoyed the benefit of a two-year period of time within which she could attempt to gather evidence to support her wage discrimination claims. Norand's Brief in support of its Motion for Summary Judgment brought to the district court's attention Berg's failure to produce any evidence that she was paid less than her male counterparts at Norand, despite performing a job which required equivalent skill, effort and responsibility.

(App. 169.) Norand pointed out that Berg's own deposition testimony and her pleadings indicated only that some male employees received a higher wage than Berg, without indicating that any job performed by a male employee at Norand was equal to Berg's position in terms of skill, effort, responsibility and working conditions. (App. 170.) Thus, contrary to Berg's Petition, Norand specifically informed the district court of the basis for its motion for summary judgment on her wage discrimination claims and noted Berg's failure to articulate, in her deposition testimony or pleadings, any facts indicating that a male employee was paid more than Berg for an equivalent job.

Despite the clarity of Norand's Motion for Summary Judgment, Berg failed to respond withy any evidence that she was paid less than a male employee for equivalent work. Berg only provided a conclusory, self-serving affidavit and evidence that male employees in management positions were paid more than female employees in management positions. (App. 187.) Berg's misrepresentations to this Court notwithstanding, Berg failed to provide evidence that the positions held by male management employees were equal to management positions held by female employees. This critical lack of evidence led to the dismissal of her wage discrimination claims by the district court and the Eighth Circuit. Pet. App. 8a-10a, 23a-25a.

In her appeal to the Eighth Circuit Berg raised six issues for review. Pet. App. 4a-13a. Berg did not ask the Eighth Circuit to review the issue upon which she now bases her Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

This case involved the application of well-established case law governing employment discrimination. Berg should not now be allowed to base her Petition for a Writ of Certiorari on an issue she did not raise below. Further, irrespective of Berg's failure to raise the issue below, the record makes clear that both the district court and the Eighth Circuit correctly applied the appropriate standard for summary judgment as set forth in Federal Rule of Civil Procedure 56. Finally, Berg presents no evidence that the courts of appeal, including the Eighth Circuit, are confused with regard to the proper standard for summary judgment in employment discrimination cases. Instead, Berg's Petition suffers from her confusion between the initial burden a movant for summary judgment must meet (and which was met in this case) and the burden on the non-moving party to provide some evidence that she will be able to prove an essential element of her claim. Berg simply ignores the fact that both the district court and the Eighth Circuit concluded that she did not present sufficient evidence to indicate that even a *prima facie* case of wage discrimination existed. Berg's last-ditch effort to avoid the consequences of her failure to present even a *prima facie* case of wage discrimination should be denied.

I.

BERG SHOULD NOT BE ALLOWED TO PREMISE HER PETITION FOR A WRIT OF CERTIORARI ON AN ARGUMENT SHE FAILED TO RAISE BELOW.

In her appeal to the Eighth Circuit Berg identified six issues for further review. Berg argued that genuine issues of

material fact existed as to her disability discrimination, negligent misrepresentation, breach of implied contract, false imprisonment and equal pay claims and that the district court erroneously denied her permission to file a responsive brief. The Eighth Circuit addressed and ruled against Berg on each issue raised. Berg now argues that the decisions of the district court, the Eighth Circuit Court of Appeals and other courts of appeal are inconsistent with this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (addressing the appropriate standard to be applied to motions for summary judgment). Berg's argument should be rejected because it was not raised below. *Matsushita Elec. Indus. v. Epstein*, 516 U.S. 367, 379, n.5, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996) (noting that "we generally do not address arguments that were not the basis for the decision below").

II.

THE EIGHTH CIRCUIT'S OPINION IS CONSISTENT WITH FEDERAL RULE OF CIVIL PROCEDURE 56(c) AND *CELOTEX CORP. v. CATRETT*, 477 U.S. 317 (1986).

Even if this Court were to entertain Berg's new argument, a writ of certiorari is not warranted because both the district court and the Eighth Circuit correctly applied the standard for summary judgment set forth in *Celotex*. Berg's failure to present any facts to establish a *prima facie* case under Title VII and the Equal Pay Act led to the dismissal of these claims.

In order to generate a *prima facie* case of wage discrimination, Berg needed to present evidence that Norand paid male employees more than it paid her for jobs which required ". . . equal skill, effort, and responsibility, and which

are performed under similar working conditions . . ." 29 U.S.C. § 206(d)(1) (1994); *see also McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 513 (8th Cir. 1995). Prior to moving for summary judgment on Berg's wage discrimination claims, Norand reviewed Berg's pleadings, deposition transcripts and the paper discovery produced by both sides, finding no evidence to support her allegations. Consequently, Norand's Motion for Summary Judgment informed the district court that the pleadings and Berg's own deposition testimony on this issue were devoid of any evidence of wage discrimination. (App. 169-170.) Norand pinpointed the fatal flaw in Berg's wage discrimination claims. The district court and Berg were made aware that although Berg's deposition testimony established that she was paid less than some male employees, Berg had presented no evidence that the jobs held by these male employees were equivalent in skill, effort and responsibility and were performed under similar working conditions.

Berg enjoyed ample opportunity to discover and present evidence to support her claims both before and after Norand moved for summary judgment. Norand's motion was filed more than two years after Berg filed her Complaint. Berg was even granted an extension of time to file her response to Norand's motion in order to allow her to take an additional deposition. When Berg finally filed her resistance she still provided no evidence, her self-serving, conclusory affidavit notwithstanding, that any male employee was paid more for a job requiring equal skill, effort, and responsibility, and which was performed under similar working conditions.

The district court and the Eighth Circuit, recognizing the lack of evidence to support Berg's wage discrimination claims, granted and affirmed summary judgment in full

compliance with this Court's standards for summary judgement. Norand discharged its initial burden of informing the district court of the basis for its motion by pointing out that all Berg's deposition testimony and her pleadings established is that some male employees were paid more than Berg. *Celotex v. Catrett*, 477 U.S. at 323. Norand then informed the district court that no evidence indicated Berg's job was equivalent to any male employee's position. The district court and the Eighth Circuit, after reviewing Berg's response, rejected Berg's attempt to avoid summary judgment pursuant to this Court and Rule 56's directive that summary judgment should be entered if, after adequate time for discovery, the nonmoving party ". . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322 (*citing* Fed. R. Civ. P. 56).

III.

THE DECISIONS OF OTHER COURTS OF APPEAL ARE CONSISTENT WITH FEDERAL RULE OF CIVIL PROCEDURE 56 AND *CELOTEX CORP. v. CATRETT*, 477 U.S. 317 (1986).

Berg erroneously represents that a number of courts have held that the party moving for summary judgment is relieved of any burden if the nonmoving party cannot establish a *prima facie* case. Pet. 8. None of the cases to which Berg refers stand for this proposition.

For instance, *Brinkley v. Harbour Recreation Club*, No. 98-2035, 1999 U.S. App. LEXIS 13125 (4th Cir. June 14, 1999) did not address whether the movant had complied with

its initial responsibility of informing the court of the basis of its motion and identifying portions of the record which demonstrate that no genuine issue of material fact exists. Instead, the Fourth Circuit's analysis focused on the plaintiff's inability to proffer evidence supporting the existence of a *prima facie* claim of discrimination and whether the defendant's affirmative defense to the equal pay claim was valid and timely raised. *Id.* at *13. *See also Lyoch v. Anheuser-Bush Cos.*, 139 F.3d 612, 616 (8th Cir. 1998) (focusing on whether the non-moving party's evidence raised a genuine issue of material fact); *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 478-483 (7th Cir. 1995) (affirming the entry of judgment against the plaintiff based on her inability to present evidence which would support a *prima facie* case of discrimination).

These courts' reference to the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) does not indicate confusion as to the requirements of Federal Rule of Civil Procedure 56(c). Instead, reference to *McDonnell Douglas* is consistent with Rule 56(c)'s mandate that summary judgment must be entered when the nonmoving party cannot present sufficient evidence ". . . to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. at 322.

Berg's confusion stems from her misunderstanding of the appropriate analysis employed by appellate courts throughout the United States. These courts, including the Eighth Circuit, are not "confused". As accurately articulated in *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995), the movant must first demonstrate that there is a lack of evidence to support the non-moving party's case.

After the moving party has met this initial burden, the nonmoving party must ". . . set forth specific facts to demonstrate that she has met her burden of establishing a *prima facie* case." *Id.*

CONCLUSION

Berg should not be allowed to raise a new and invalid issue in order to avoid the effect of her failure to present even a *prima facie* case of wage discrimination. The law and the facts applicable to this case are well established. An employee must produce evidence that a higher paid male employee is performing work which requires equal skill, effort, and responsibility, and which is performed under similar working conditions. Berg failed to produce any evidence to support this requisite element of her claim. For these reasons, Norand respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

KEVIN J. VISSER*
PAUL D. GAMEZ
MOYER & BERGMAN, P.L.C.
Attorneys for Respondent
2720 First Avenue, N.E.
P.O. Box 1943
Cedar Rapids, Iowa 52406-1943
(319) 366-7331

* *Counsel of Record*